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AHMED IBRAHIM BILAL

v.

KETUA POLIS NEGARA & ORS

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
[CRIMINAL APPEAL NO: P-09-24-2004]

C

24 SEPTEMBER 2010

CIVIL PROCEDURE: *Affidavit - Contents - Whether contents of affidavit hearsay - Affidavits in support of originating motion affirmed on behalf of applicant and not by applicant - Affidavits inadmissible - Rules of the High Court 1980, O. 41 rr. 1(4), 5*

D

CIVIL PROCEDURE: *Mode of commencement - Originating motion - Application for declaration that certain provisions of Immigration Act 1959/1963 are null and void - Application for declaration that warrant of arrest and deportation unlawful - Application by way of originating motion - Whether mode of commencement authorised by law - Facts warranting commencement of proceedings under O. 53 Rules of the High Court 1980 - Originating motion improper mode - Rules of the High Court 1980, O. 5 rr. 1, 5*

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EVIDENCE: *Affidavit - Contents of affidavit - Whether contents of affidavit hearsay - Affidavits in support of originating motion affirmed on behalf of applicant and not by applicant - Affidavits inadmissible - Rules of the High Court 1980, O. 41 rr. 1(4), 5*

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The appellant/applicant who had entered Malaysia on a student visa claimed that he was detained and taken out of the country in an aircraft belonging to the Government of the United States of America. The appellant filed in the High Court a Notice of Motion seeking the following: (i) a declaration that the provisions of s. 33

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of the Immigration Act 1959/1963 ('IA 59/63') are subject to the provisions of art. 5 of the Federal Constitution, Criminal Procedure Code ('CPC'), s. 117 Extradiction Act 1992 and the Laws of Malaysia; (ii) a declaration that ss. 9, 15(1)(c) and 33 of the IA 59/63 are null and void; and (iii) a declaration that the warrant of

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arrest and deportation was illegal, unlawful and *mala fide*. The declaratory orders sought to impugn and challenge the validity of

certain orders made by the 3rd respondent in particular. The related affidavits were filed on behalf of the appellant and not by the appellant. The application was struck out by the High Court which held that the manner in which the application was brought was improper. The High Court determined that the circumstances of the case warranted the application of O. 53 of the Rules of the High Court 1980 ('RHC') and the commencement of the action by way of a notice of motion fell outside the provisions of O. 5 r. 1 of the RHC. Hence this appeal. The appellant contended that an application for a declaration is not restricted to one under O. 53 r. 2 of the RHC.

Held (dismissing the appeal with costs)
Per Heliliah Mohd Yusof JCA:

(1) Order 5 r. 1 of the RHC is to be viewed in connection with O. 5 r. 5 which stipulates that proceedings may be begun by originating motion or petition if, but only if the RHC or under any other written law the proceedings in question are authorised or are required to be initiated as such. (para 6)

(2) The remedies sought would require the court to pronounce upon orders issued by the Director General and acts by the executive arm of the government in facilitating the deportation of the appellant from Malaysia. The prayers stated in the notice of motion could be described as hybrid in nature. The reference to s. 365 of the CPC manifested an intention to invoke habeas corpus proceedings but in its entirety the notice of motion attempted to convert the character of the proceedings to one that was quasi criminal and yet quasi civil in nature. In substance the application sought the court to scrutinise the steps taken by the executive arm of the government of Malaysia in removing the appellant from Malaysia under various provisions of the IA 59/63 and purported actions under the Extradition Act 1992. (paras 8-9)

(3) The High Court had determined that the circumstances of the case warranted that O. 53 was applicable. The hybrid nature of the application verged in effect on an abuse of the process. (paras 15 & 16)

A **(4)** The affidavits filed in support of the application fell foul of O. 41 r. 1(4) and O. 41 r. 5. The contents of the affidavits also indicated that there were portions which were not only inadmissible but were in the character of hearsay statements. (para 17)

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Bahasa Malaysia *Translation Of Headnotes*

Perayu/pemohon yang telah memasuki Malaysia dengan menggunakan visa penuntut mengatakan bahawa beliau telah ditahan dan dibawa keluar dari negara dalam sebuah kapal terbang
C yang dimiliki oleh Kerajaan Amerika Syarikat. Perayu memfailkan dalam Mahkamah Tinggi satu notis usul menuntut yang berikut: (i) suatu deklarasi bahawa peruntukan-peruntukan s. 33 Akta Imigresen 1959/1963 ('AI 59/63') tertakluk kepada peruntukan-peruntukan
D Perkara 5 Perlembagaan Persekutuan, Kanun Tatacara Jenayah ('KTJ'), s. 117 Akta Ekstradisi 1992 dan Undang-undang Malaysia; (ii) suatu deklarasi bahawa ss. 9, 15(1)(c) dan 33 AI 59/63 adalah batal dan tak sah; dan (iii) suatu deklarasi bahawa waran penangkapan dan pengusiran adalah menyalahi undang-undang dan
E *mala fide*. Perintah-perintah deklarasi tersebut cuba menyangkal dan mencabar keesahan beberapa perintah yang dibuat oleh terutamanya responden ketiga. Afidavit-afidavit yang berkaitan telah difailkan bagi pihak perayu dan bukan oleh perayu. Permohonan tersebut dibatalkan oleh Mahkamah Tinggi yang mendapati bahawa cara
F permohonan itu dilaksanakan adalah tidak betul. Mahkamah Tinggi menentukan bahawa keadaan-keadaan kes mewajarkan penggunaan A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan permulaan tindakan tersebut melalui notis usul tidak termasuk dalam peruntukan A. 5 k. 1 KMT. Oleh yang demikian rayuan semasa
G dibuat. Perayu menghujah bahawa sesuatu permohonan untuk suatu deklarasi tidak dihadkan kepada permohonan di bawah A. 53 k. 2 KMT.

Diputuskan (menolak rayuan dengan kos)
Oleh Heliliah Mohd Yusof HMR:

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(1) A. 5 k. 1 KMT seharusnya dibaca bersama dengan A. 5 k. 5 yang menyatakan bahawa prosiding boleh dimulakan oleh usul pemula atau petisyen tetapi, tetapi hanya jika KMT atau di bawah undang-undang bertulis lain prosiding yang disoalkan
I diberikuasa atau perlu dimulakan sedemikian.

(2) Remedi-remedi yang dituntut memerlukan mahkamah untuk mengumumkan atas perintah-perintah yang dikeluarkan oleh Ketua Pengarah dan tindakan-tindakan oleh cabang eksekutif kerajaan dalam memudahkan pengusiran perayu dari Malaysia. Tuntutan-tuntutan yang dinyatakan dalam notis usul hanya boleh dijelaskan sebagai bersifat hibrid. Rujukan kepada s. 365 KTC menunjukkan niat untuk menggunakan prosiding *habeas corpus* tetapi secara keseluruhannya notis usul cuba menukarkan sifat prosiding kepada prosiding yang bersifat kuasi jenayah dan juga kuasi sivil. Dalam substans permohonan menuntut mahkamah meneliti langkah-langkah yang diambil oleh cabang eksekutif kerajaan Malaysia dalam mengusirkan perayu dari Malaysia di bawah beberapa peruntukan-peruntukan AI 59/63 dan tindakan-tindakan di bawah Akta Ekstradisi 1992.

(3) Mahkamah Tinggi telah menentukan bahawa keadaan-keadaan kes mewajarkan bahawa A. 53 boleh digunakan. Sifat hibrid permohonan tersebut hampir-hampir merupakan suatu penyalahgunaan proses.

(4) Afidavit-afidavit yang difailkan untuk menyokong permohonan tersebut melanggar A. 41 k. 1(4) dan A. 41 k. 5. Kandungan afidavit-afidavit juga menunjukkan bahawa terdapat bahagian-bahagian yang bukan sahaja tidak boleh diterima tetapi bersifat pernyataan dengar cakap.

Case(s) referred to:
O'Reilly v. Mackman [1983] 2 AC 237

Legislation referred to:
Criminal Procedure Code, s. 365
Rules of the High Court 1980, O. 5 rr. 1, 5, O. 8 rr. 1, 2, 3, O. 15 r. 16, O. 41 r. 1(4), 5, O. 52 r. 3(1), (3), O. 53 r. 2

Other source(s) referred to:
Zamir & Woolf, *The Declaratory Judgment,* 2nd edn, p 254

For the appellant - Darshan Singh Khaira; M/s Darshan Singh & Co
For the respondents - Mohd Dusuki Mokhtar SFC

[Appeal from High Court, Pulau Pinang, Criminal Application No: 44-55-2002]

[Editor's note: For the High Court judgment, please see Ahmed Ibrahim Bilal v. Ketua Polis Negara & 3 Ors [2004] 1 LNS 10.]

Reported by Amutha Suppayah

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JUDGMENT

Heliliah Mohd Yusof JCA:

[1] The applicant (the appellant before us) had filed in the High Court a notice of notion (or notis usul) seeking the following (in its original text):

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(a) suatu deklarasi bahawa peruntukkan seksyen 33 Akta Imigresen 1959/1963 adalah terikat (subject to) kepada peruntukkan Fasal 5 Perlembagaan Persekutuan, Kanun Acara Jenayah, Seksyen 117 Akta Extradisi 1992 dan Undang-Undang Malaysia.

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(b) suatu deklarasi bahawa seksyen-seksyen 9,15(1) c dan 33 Akta Imigresen 1959/1963 adalah tidak sah, null, void dan batal.

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(c) suatu deklarasi bahawa waran tangkap dan deportasi Ahmed Ibrahim Bilal adalah illegal, unlawful dan *mala fide*.

[2] The affidavit in support of the application indicated that Ahmed Ibrahim Bilal (the applicant) had directed that the application be filed. The notice of motion was filed on 14 October 2002.

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[3] The background to the application may be extracted from the affidavits filed in support of the application. It is to be noted from the outset that the affidavits were being filed on behalf of the applicant and not by the applicant. Briefly it is asserted that the applicant had entered Malaysia legally on a student visa to study at the International Islamic University in Gombak, Selangor. The applicant was detained and apparently taken out of the country in an aircraft belonging to the Government of the United States of America. The merits of the application were not adjudicated at all as the application itself was struck out by the High Court when the court upheld a preliminary objection raised by the learned senior federal counsel. The senior federal counsel had contended that the manner in which the application was brought was itself improper.

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[4] Hence the appeal was brought before us. We note that the issue that was specifically dealt with by the learned trial judge is that it is incumbent upon a litigant to move a court properly in accordance with the provisions found in the Rules of High Court 1980 (RHC 1980).

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[5] The declaratory orders that are sought seek to impugn and challenge the validity of certain orders made by the 3rd respondent in particular. The High Court pursuant to O. 15 r. 16 is empowered to make declaratory orders. However in seeking the orders what has been raised as an issue before the High Court is that the mode of commencing the action by way of a notice of motion falls outside the provisions of O. 5 r. 1 RHC 1980 that states:

> **1 Mode of beginning civil proceedings (O. 5 r. 1)**
>
> Subject to the provisions of any written law and of these rules, civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.
>
> **5 Proceedings to be begun by motion or petition (O. 5 r. 5)**
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> Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any written law the proceedings in question are required or authorised to be so begun.

[6] Order 5 r. 1 however is not to be read in isolation. It could also be viewed in connection with O. 5 r. 5 (see above). The latter rule clearly stipulates that proceedings may be begun by originating motion or petition if, but only if the RHC 1980 or under any other written law the proceedings in question are authorised or are required to be initiated as such. A clear instance of this is manifested in O. 52 r. 3(1) which states, *inter alia*, "... the application for the order must be made by motion to the court ..." And further O. 52 r. 3(3) provides for a "notice of motion".

[7] In the appeal before us the appellant is seeking remedies premised on certain alleged contravention of various legislation. The contention raised by the appellant places emphasis that an application for a declaration is not restricted to one under O. 53 r. 2.

[8] Nevertheless the question remains that the High Court has ruled that the nature of the remedy sought is such that the procedure by way of a notice of motion is erroneous. The submission raised by the senior federal counsel necessitates an appraisal of the nature of the remedies sought. The remedies sought would require this court to pronounce upon orders issued by the Director General and acts by the executive arm of the government in facilitating the deportation of the applicant from Malaysia.

[9] The prayers stated in the notice of motion could be described as hybrid in nature. The reference to s. 365 of the Criminal Procedure Code (CPC) manifests an intention to invoke *habeas corpus* proceedings but in its entirety the notice of motion attempts to convert the character of the proceedings to one that is quasi criminal and yet quasi civil in nature. From the records of the appeal, the appellant had been removed out of Malaysia for reasons that certain activities alleged to be conducted by the appellant may be prejudicial to public security.

[10] It is noteworthy that in such a context the granting of the orders sought would raise the question whether the whole exercise has also become academic in nature.

[11] Two factors are not to be disregarded in the circumstances of the case. Firstly, at the time of the hearing of the application, the applicant himself was no longer present on Malaysian soil. Before the declaratory orders could be granted certain evidence would have to be adduced before the court for the very nature of the case invites the High Court to exercise a discretion.

[12] The decision of the High Court is premised distinctively on the issue that the wrong procedure has been invoked. The learned trial judge has dealt with the question that a party could not move a court in any way that it pleases but is bound to move the court according to the requirements spelt out in the RHC 1980 which *inter alia* includes O. 5 and O. 8. Order 8 r. 1 states:

> **1 Application (O. 8 r. 1)**
>
> The provisions of this Order apply to all motions subject, in the case of originating motions of any particular class, to any special provisions relating to motions of that class made by these rules or by or under any written law.

[13] It is within O. 8 r. 2 that there is a reference to a notice of motion and the forms are prescribed according to O. 8 r. 3. The preliminary objection raised by the senior federal counsel and sustained by the High Court brings forth the question as to the suitability of the method of commencing proceedings. Some useful observations are found in Zamir & Woolf *"The Declaratory Judgment* 2nd edn" at p. 254 wherein it is explained:

Methods of commencing proceedings

7.03 In the absence of a statute providing otherwise, applications for a declaration are usually commenced by writ, originating summons or by way of an application for judicial review. Proceedings may also be begun by originating motion or petition but only if the Rules of the Supreme Court or any Act require or authorise them to be begun in this way. ... If the proceedings relate to the manner of performance by a public body of its public duties then, unless the claim for declaratory relief is made on an application for judicial review, there is a danger of the claim being dismissed as an abuse of the process of the court.

Proceedings by writ

7.04 Some proceedings must be brought by writ. Where a writ can, but is not required to, be used, then the use of a writ is the more appropriate procedure where there are likely to be disputed issues of fact. There will then be pleadings which will define the issues between the parties. The writ need not set out the terms of the declaration which is claimed. It is sufficient if it sets out the "nature of the claim made, or the relief or remedy" claimed. The statement of claim should state the specific terms of the declaration claimed. However, the court can, notwithstanding this requirement, in its discretion grant a declaration if it is appropriate to do so even if there is no claim for declaratory relief included in either the writ or statement of claim and the relief claimed is refused.

[14] The aforementioned explanation is useful in elucidating the position in this appeal. The application made on behalf of the appellant not only did not conform in procedure to the rules as enumerated above but it was also initiated as a form of criminal application suggesting an application for a writ of *habeas corpus*. However in substance the application also seeks this Court to scrutinise the steps taken by the executive arm of the government of Malaysia in removing the appellant from Malaysia under various provisions of the Immigration Act 1959/1963 and purported actions under the Extradition Act 1992.

[15] The High Court has determined that the circumstances of this case warrant that O. 53 is applicable. This calls forth the speech of Lord Diplock in *O'Reilly v. Mackman* [1983] 2 AC 237 which has been described as a "canonical statement" by Prof. Sir William Wade the relevant passages of which are as follows:

A My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981. There is a great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action *begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.*

D The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under Order 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it *would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.*

My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law,

> or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis-a ...

[16] The hybrid nature of this application verges in effect on an abuse of the process although it has also been contended before the court below that the nature of the application has a prejudicial effect upon the respondents.

[17] The issue of the affidavits has been sidestepped. Nevertheless though consciously aware that pronouncing on the point is obiter, in the circumstances of the applicant it is compelling to note that the affidavits filed in support of the application fell foul of O. 41 r. 1(4) and O. 41 r. 5. A careful appraisal of the contents of the affidavits also indicates that there are portions which are not only inadmissible but are in the character of hearsay statements.

[18] For all the reasons stated we are of the view that there is indeed no valid ground for appellate intervention. This appeal is therefore dismissed with costs. The decision of the High Court is affirmed. The deposit to be returned to the appellant.